GEORGE ANTHONY PERVAN

v.

THE NORTH QUEENSLAND NEWSPAPER COMPANY LTD. & ANOR.

HIGH COURT, AUSTRALIA
MASON CJ, BRENNAN, DEANE, DAWSON, TOOHEY, GAUDRON & McHUGH JJ.
[F.C. 93/050]
17 NOVEMBER 1993

DEFAMATION: Newspaper company sued over the publishing of an advertisement in its newspaper - Statements related to misuse of public funds by a Councillor - Whether the statements, partly in the form of questions, were statements of fact or expressions of opinion in the manner of comments - Whether the characterization of the statements was an issue for the judge or the jury - Whether comments were fair.

The appellant/plaintiff (GAP) sued the first respondent over the publication of an advertisement in its newspaper which he claimed defamed him. The second respondent was the author of the advertisement. The said advertisement ran thus:

> Councillors feathering their own nests? Funds being misappropriated? This is doing irreparable damage to our shire. It is now more important than ever to attend the ratepayers and residents meeting at the ...

At first instance GAP succeeded and was awarded damages by the jury. On appeal, the Full House of the Supreme Court of Queensland set aside the verdict. The first respondent (R1) denied the statements were defamatory and relied on two statutory defences - ss. 377(5) and 377(8) of the Criminal Code. Section 377(5) dealt with publications made in good faith and s. 377(8) provided a lawful excuse for the publication of defamatory matter.

> (8) If the publication is made in good faith in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit, and if, so far as the defamatory matter consists of comment, the comment is fair.

The Full Court held that the defence under s. 377(8) was wrongly withheld from the jury. The Full Court was also of the view that the two questions in the advertisement were assertions of fact and the next sentence comment.

The appeal before the High Court centred upon the interpretation of s. 377(8) and the issues were:

- Whether the statements made were fact or comment
- Whether the protection under s. 377(8) is available only in those circumstances when the facts on which the comment is based are true and stated, referred to or notorious to those whom the publication is directed to
- Whether the publisher ought to hold the opinion expressed.

Prior to the advertisement, a member of Parliament had made allegations in Parliament about the misapplication of disaster relief funds by GAP for furthering his own business interests. The Full Court had felt that the 2 questions in the advertisement were statements of fact, a conclusion perhaps derived from the reasoning that the questions were republications of the MP's allegation in the form of the rhetorical questions.

Held:

[1] Both at common law and under a statutory provision, the issue of whether a statement is a statement of fact or comment (expression of opinion) is a matter for the jury. It is only if the imputation is reasonably capable of being regarded only as a fact or only as comment that the trial Judge may take the question away from the jury. However, the failure to leave the question to the jury is not a ground for a new trial.

[2] When viewing the nature of the statements, it may be regarded that the author of the allegations, aware of the previous allegations against the appellant, was seeking to raise before the public the correctness of the allegations and stating that these unresolved allegations were damaging the image of the shire. Accordingly, he felt attendance at the meeting was of great importance. In this light, the 2 questions in the advertisement are characterized as comment. The next sentence may also be regarded as an expression of opinion as to the effect of the allegations.

[3] The lawful excuse provided in the subsection to the publication of a defamatory fair comment is not lost by reason of the absence of

the publication of facts on which the comment is based provided the jury is satisfied that the facts on which the comment is based are sufficiently indicated or notorious in order to enable those to whom the publication to published to judge for themselves how far the opinion so expressed in the comment is well-founded.

Section 377(8) provides protection if the facts on which the comment is and can be seen to be based are not believed to be untrue and the statement or indication of the facts as such is protected by the section, subject to the requirements of "good faith" and the other requirements of the section. Those requirements include the fairness of the comment and the relevance of the comment to the privileged occasion.

The paramount policy interest evident in s. 377(8) is the encouragement and protection of freedom of discussion on a matter of public interest for the publics' benefit. Therefore it is inappropriate to construe that a participant in the discussion of such a matter should firstly satisfy himself of the truth of facts before proceeding to advance any comments. It is sufficient that under s. 377(8) the publication is made in good faith and is objectively fair.

[4] In the present case, the appellant has not shown that there was any ill-will or other improper motive on the part of the officers of the first respondent (R1) towards him. Nor was there any hint that those connected with the newspaper believed the contents to be untrue. Neither did the publication exceed what was reasonably sufficient for the occasion, either in the manner or extent of it as it was a matter of public interest even to persons residing outside the shire.

Per McHugh J:

In the present case, an ordinary reader would think that the question marks at the end of the first and second sentences in the advertisement indicated there was something suspicious about the conduct of the councillors which needed investigation. The notice in the papers is a statement on the conduct of the councillors, not about the parliamentary allegation. Thus to establish fair comment, the first respondent has to identify the facts concerning the conduct of the plaintiff in relation to the funds. However, there was no attempt to identify or prove the facts. The trial appears to have been conducted on the basis that the subject of public interest which was the basis for the comment was the appellants' conduct and the first respondent's pleading confirms this. The appeal should be allowed and the verdict of the jury restored.

[Appeal dismissed with costs].

Cases referred to:

Telegraph Newspaper Co. Ltd. v. Bedford [1934] 50 CLR 632 ***(cit)***
Bamberger v. Mirror Newspapers Ltd. [1969] 43 ALJR 242 ***(cit)***
O'Shaughnessy v. Mirror Newspapers Ltd. [1970] 125 CLR 166 ***(cit)***
Kemseley v. Foot [1952] AC 345 ***(refd)***
Telnikoff v. Matusevitch [1992] 2 AC 343 ***(cit)***
Wason v. Walter [1868] LR 4 QB 73 ***(refd)***
Magena v. Wright [1909] 2 KB 958 ***(refd)***
Australian Consolidated Press Ltd. v. Uren [1966] 117 CLR 185 ***(refd)***
Calwell v. Ipec Australia Ltd. [1975] 135 CLR 321 ***(cit)***
Davies v. Shepstone [1886] 11 App. Cas. 187 ***(cit)***
Goldsbrough v. John Fairfax & Sons Ltd. [1934] 34 S.R. (NSW) 524 ***(cit)***
Orr v. Isles [1965] 83 WN (Pt 1) (NSW) 303 ***(cit)***
Bjelke-Petersen v. Burns & A.B.C. [1988] 2 Qd R. 129 ***(cit)***
Grech v. Odhams Press Ltd. [1958] 2 QB 275 ***(refd)***
Brent Walker Group Plc. v. Time Out Ltd. [1991] 2 QB 33 ***(refd)***
Thompson v. Truth and Sportsman Ltd. [1930] 31 SR (NSW) 292 ***(cit)***
Bailey v. Truth and Sportsman Ltd. [1938] 60 CLR 700 ***(foll)***
Givens v. David Syme & Co. (No. 2) [1917] VLR 437 ***(cit)***
Cohen v. Mirror Newspapers Ltd. [1965] 83 WN 369 ***(cit)***
Justin v. Associated Newspapers Ltd. [1966] 86 WN (Pt 1) (NSW) 17 ***(cit)***
Rigby v. Associated Newspapers Ltd. [1966] 68 SR (NSW) 414 ***(foll)***
Uren v. Australian Consolidated Press Ltd. [1969] 71 SR (NSW) 29 ***(dist & not foll)***
Gorton v. Australian Broadcasting Commission [1973] 22 FLR 181 ***(cit)***
Clines v. Australian Consolidated Press Ltd. [1966] 84 WN (Pt 2) (NSW) 86 ***(cit)***
Denham v. Mirror Newspapers Ltd. [1966] 86 WN (Pt 2) (NSW) 1 ***(cit)***
Mackie v. John Fairfax & Sons Ltd. [1966] 1 NSWR 641 ***(cit)***
Slim v. Daily Telegraph Ltd. [1968] 2 QB 157 ***(refd)***
Cherneskey v. Armadale Publishers Ltd. [1978] 90 DLR (3d) 321 ***(refd)***
Dawson v. Dover Chronicle [1913] 108 LT 481 ***(refd)***
Digby v. Financial News Ltd. [1907] 1 KB 502 ***(refd)***

Sutherland v. Stopes [1925] AC 47 ***(refd)***
Peter Walker & Son Ltd. v. Hodgson [1909] 1 KB 239 ***(cit)***
Gardiner v. John Fairfax & Sons Pty. Ltd. [1942] 42 SR (NSW) 171 ***(cit)***
Turner v. M-G-M Pictures Ltd. [1950] 1 All ER 449 ***(refd)***
Slatyer v. Daily Telegraph Newspaper Co. Ltd. [1908] 6 CLR 1 ***(refd)***
Hawke v. Tamworth Newspaper Co. Ltd. [1983] 1 NSWLR 699 ***(cit)***
Jones v. Skelton [1963] 63 SR (NSW) 644 ***(refd)***

Legislation referred to:
Criminal Code Act 1899, ss. 6, 375, 377(5), (8) (4)
Defamation Act 1958, s. 17(h) (N.S.W.)
Defamation Law of Queensland 1889, ss. 9, 17(8)

Other sources referred to:
Carter's Criminal Law of Queensland, 7th Edn., (1988), p. 5097
Libel and Slander, 8th Edn., (1981), par. 730, n. 51, pp. 313-314
Salmond on Torts, 14th Edn., (1965), pp. 247-249

For the appellant - B.K. Gillan
For the respondents - Connolly Suthers

JUDGMENT

Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ:
This appeal raises two questions concerning the interpretation of s. 377(8) of the Criminal Code ("the Code") contained in the Criminal Code Act 1899 (Q.). Section 377(8), one of the provisions of Ch. XXXV of the Code, contains the main body of the law of defamation in Queensland *Telegraph Newspaper Co. Ltd. v. Bedford* [1934] 50 CLR 632, at p. 649.

The facts

In 1986, when the appellant, George Anthony Pervan, was a councillor of the Johnstone Shire Council and Chairman of its Works Committee, a member of the Parliament of Queensland made allegations in Parliament that the appellant had misapplied the Council's cyclone relief funds and that he had been "feathering his own nest". On two occasions, the *Innisfail Advocate* ("the Advocate"), a newspaper published by the first respondent, published a fair report of these allegations. It also published replies to the allegations. It then published on behalf of the second respondent, Herbert William Layt, in its public notices an advertisement in these terms:

> Councillors feathering their own nests? Funds being misappropriated? This is doing irreparable damage to the image of our shire. It is now more important than ever to attend the ratepayers and residents meeting at the Grand Central Hotel Tuesday, 12 August at 8 p.m.

The proceedings

The appellant sued the first respondent for damages, alleging that the advertisement was defamatory of him. It seems that at some stage of the proceedings the second respondent was joined as a defendant but he did not participate in the proceedings in the courts below or in this Court. By its amended defence the first respondent denied that the advertisement was defamatory and that it was defamatory of the appellant. The first respondent also pleaded defences under ss. 377(5) and 377(8) of the Code.

The defence under s. 377(5) was pleaded in these terms:

> the publication was made in good faith for the information of the public on the subject namely the expenditure of the Cyclone Winifred Disaster Relief Fund and the use of Shire Council assets, labour and funds for private purposes as to which the (first respondent] believed on reasonable grounds the public had such an interest in knowing the truth as to make the [first respondent's] conduct in making the publication reasonable under the circumstances

The defence under s. 377(8) was pleaded in these terms:

> the words published were published in good faith and in the course of or for the purposes of discussion of the same subject of public interest, namely the expenditure of the Cyclone Winifred Disaster Relief Fund and the use of Shire Council assets, labour and funds for private purposes the public discussion of which is for the public benefit.

The appellant joined issue on these defences.

The action was heard by a Judge and Jury in the District Court. The trial Judge excluded the two statutory defences. He evidently thought that it was an essential element in the defence under s. 377(5) that the person publishing the defamatory matter believes it to be true and that there was no evidence of such belief. The trial Judge seems to have ruled that the defence under s. 377(8) was not available because, to the extent that the publication consisted of comment, it was not fair. His Honour apparently regarded the two questions in the advertisement as comment and the next sentence as a statement of

fact. He did not seek a finding from the Jury on any matters of fact upon which the defence depended because he considered that it was not open as a matter of law. The Jury returned a verdict for the appellant for $4,000 damages.

The Full Court of the Supreme Court of Queensland (Demack, Thomas and Mackenzie JJ.) allowed the first respondent's appeal. The Court held that, although the defence under s. 377(5) was correctly withheld from the jury, the defence under s. 377(8) should have been left to the jury and that, on the evidence, judgment should be entered for the first respondent. The Full Court considered that the two questions were assertions of fact and the next sentence comment.

The statutory provisions

The provisions of Ch. XXXV of the Code must be read with s. 9 of the Defamation Law of Queensland 1889 (Q) ("the 1889 Law") and s. 6 of the Criminal Code Act. Section 9 of the 1889 Law provides that the unlawful publication of defamatory matter is an actionable wrong. Section 6 of the Criminal Code Act provides:

> When by the Code any act is declared to be lawful, no action can be brought in respect thereof.
>
> Except as aforesaid, the provisions of this Act shall not affect any right of action which any person would have had against another if this Act had not been passed; nor shall the omission from the Code of any penal provision in respect of any act or omission which before the time of the coming into operation of the Code constituted an actionable wrong affect any right of action in respect thereof.

Section 377 of the Code provides that it is a lawful excuse for the publication of defamatory matter if the publication is made in any one of eight specified circumstances, of which sub-s. (8) is one.

Section 377(8) provides:

> It is a lawful excuse for the publication of defamatory matter -
>
> ...
>
> (8) If the publication is made in good faith in the course of, or for the purpose of, the discussion of some subject of public interest, the public discussion of which is for the public benefit, *and if, so far as the defamatory matter consists of comment, the comment is fair.*
>
> For the purposes of this section, a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter; if the manner and extent of the publication does not exceed what is reasonably sufficient for the occasion; and if the person by whom it is made is not actuated by ill-will to the person defamed, or by any other improper motive, and does not believe the defamatory matter to be untrue.
>
> (emphasis added)

Section 378 provides that the burden of proving the absence of good faith lies on the person alleging it.

Section 377(8) gives rise to two principal questions:

(1) Is the protection under that sub-section for comment which is fair only available when the facts on which the comment is based are indeed true and stated, referred to or notorious to those to whom the matter is published?

(2) Is it an essential element of the defence when pleaded in relation to the publication of another's comment that the publisher hold the opinion expressed in the comment?

On the hearing of the appeal, the appellant indicated that he no longer pressed a ground of appeal by which he had sought to argue that the Full Court erred in failing to consider the defence under s. 377(8) by reference to each of the pleaded imputations. It is, accordingly, unnecessary to decide in this case whether or not the Code provides for a seperate cause of action in respect of each defamatory imputation. It should also be noted that no issue relating to the defence under s. 377(5) was directly raised on this appeal.

Statement of fact or comment?

Before we proceed to examine the questions relating to s. 377(8), it is necessary to refer to one aspect of the case which is critical to the operation of that sub-section. The appellant contends in this Court, and he seems to have contended in the courts below, that the two questions and the next sentence in the advertisement were comment. On the other hand, the first respondent contended, as it does in this Court, that the two questions were statements of fact. The Full Court upheld the first respondent's contention.

Unfortunately, neither at trial nor on appeal was consideration given to the question whether the determination of the issue - statement of fact or comment - was a matter for the judge or the jury. Both at common law and under a statutory provision such as s. 377(8), it is for the jury to decide whether what has been published is a statement of fact or an expression of opinion. See *Bamberger v. Mirror Newspapers Ltd.* [1969] 43 ALJR 242, at p. 243; *O'Shaughnessy v. Mirror Newspapers Ltd.* [1970] 125 CLR 166 (a decision on the Defamation Act 1958 (NSW), per Barwick CJ, McTiernan, Menzies and Owen JJ. at pp. 173-174; Windeyer J. at p. 177. It is only if the imputation is reasonably capable of being regarded only as fact or only as comment that the trial Judge may take the question away from the jury. Neither the trial Judge nor the Full Court adverted to this principle. Yet the principle is basic, for a defamatory statement cannot be protected as fair comment if it is an allegation of fact. *Kemsley v. Foot* [1952] AC 345, at pp. 356-357; *Telnikoff v. Matusevitch* [1992] 2 AC 343, at pp. 351, 356, 357.

The Full Court asserted that the two questions were statements of fact. No doubt this conclusion rested on the view that the questions were re-publications, in the form of rhetorical questions, of the allegations previously made by the member of Parliament. The correctness of this view is, however, open to doubt. An alternative view is that the author of the advertisement, mindful of the allegations and the subsequent newspaper debate, was seeking to raise for consideration in the public arena the correctness of the allegations. In other words, by the two questions he was asking: "Are the two allegations true?" And by the next sentence the author was saying: "The making of these unresolved allegations is causing irreparable damage to the image of the Shire". Accordingly, attendance at the meeting to be held in the Grand Central Hotel was a matter of great importance to ratepayers and residents.

So regarded, the two questions may be characterized as comment. The next sentence may also be regarded as an expression of opinion as to the effect of the allegations. The consequence is that, in our opinion, the Full Court was wrong in characterizing the questions as statements of fact. The issue should have been left to the jury as both questions, if not the next sentence as well, were capable of being regarded as statements of fact or as comment. However, as the case has been conducted on the footing that the question was one for the judge and not for the jury, the failure to leave the question to the jury is not a ground for a new trial.

The provisions of Ch. XXXV of the Code

Chapter XXXV adopted the earlier codification of the common law of defamation prepared by Sir Samuel Griffith and enacted as the 1889 Law, subject to certain alterations one of which was the addition in s. 377(8). (Section 17(8) of the 1889 Law) of the words "and if, so far as the defamatory matter consists of comment, the comment is fair". This was one of the "verbal alterations" mentioned by Sir Samuel Griffith in his letter dated 29 October 1897 to the Attorney-General forwarding the draft Code and it seems that Sir Samuel was referring to it when he said:

> Another [alteration] removes a possible doubt as to the construction of the existing Statute.

The historical records do not enable us to identify that doubt with certainty. Whether s. 17(8) of the 1889 Law protected comment as distinct from defamatory statements of fact is not clear. On the other hand, s. 17(8) might have protected an unfair comment about an individual made in good faith in the course of, or for the purposes of, the discussion of some subject of public interest, the discussion of which was for the public benefit. Concern over the insufficiency of the original provision on either score would account for the alteration. Just how far Sir Samuel intended to go in allaying that concern remains an unresolved question. But the description of the alteration as one which was merely "verbal" does not suggest that he intended to make a significant change to s. 17(8) of the 1889 Law. That provision certainly did not require a defendant to prove the truth of facts as a foundation for comment. In this respect, it is significant that, in England in 1868 in *Wason v. Walter* [1868] LR 4 QB 73 (and see *Magena v. Wright* [1909] 2 KB 958), it had been decided that at common law an honest and fair comment in a newspaper's leading article on the conduct of the plaintiff as described in a parliamentary debate was a good defence. The Court of Queen's Bench treated the fairness and accuracy of the report of the parliamentary proceedings as a sufficient foundation for comments on the subject-matter of that report ((1868) LR 4 QB, at p. 96) Indeed, in introducing the Bill for the 1889

Law, Sir Samuel Griffith quoted (Queensland, Legislative Assembly, Parliamentary Debates, 19 July 1889, p. 734) a passage from the judgment of Cockburn CJ in that case. There is nothing that would suggest that either s. 17(8) of the 1889 Law or s. 377(8) of the Code was intended to depart on this point from the common law so recently enunciated in England.

Section 377(8) is in terms identical to s. 17(h) of the Defamation Act 1958 (NSW) ("the NSW Act"), s. 17 replicating the provisions of s. 377. Both sections list eight occasions of qualified protection or privilege. As Windeyer J. observed in *Australian Consolidated Press Ltd. v. Uren* [1966] 117 CLR 185, at p. 207, though s. 17(h) has no direct common law ancestor, "its several phrases recall various statements of common-law principle" and it "is not a statutory counterpart of the common-law defence of fair comment". In the Code, that defence is to be found in s. 375.

Nonetheless, the appellant submits that the words which were added to s. 377(8) require, in accordance with established common law principle, that fair comment be an honest and genuine expression of opinion based upon facts truly stated or identified. The appellant claims support for this submission from the judgment of Windeyer J. in *Australian Consolidated Press Ltd. v. Uren* (with which Jacobs J. agreed in *Calwell v. Ipec Australia Ltd.* [1975] 135 CLR 321, at p. 334) . Windeyer J. said with reference to s. 17(h) of the NSW Act (1966) 117 CLR, at p. 208.

> If the expression 'fair comment' has its common-law meaning, as presumably it has, then the effect of s. 18, read with the decision of the Court of Appeal in *Thomas v. Bradbury, Agnew & Co. Ltd.* [1906] 2 KB 627 in mind, seems to mean that the defendant who invokes the protection of s. 17(h) for any matter of comment must first shew that comment to be fair in an objective sense before the *onus* is put upon the plaintiff to establish that it was not made in good faith: See **Salmond on Torts**, 14th Edn. (1965), pp. 247-249. That is how the question was dealt with at the trial. It is perhaps debatable.

It is not immediately apparent that Windeyer J. was saying that the reference to "fair comment" in s.17(h) imported a requirement that the comment be based on facts which are true. The statement that the defendant "must first shew that comment to be fair in an objective sense" may mean no more than that the comment must be fair and honest. However, the appellant argues that his Honour's observation must be read in the light of the established common law principle that, in order to make out a defence of fair comment, the defendant must show, amongst other things, that, where the comment is based on facts, the facts are truly stated. *(Davis v. Shepstone* [1886] 11 App. Cas. 187). Indeed, it has commonly been said that, unless the facts are true, the comment cannot be "fair". (See *Goldbrough v. John Fairfax & Sons Ltd.* [1934] 34 SR (NSW) 524, per Jordan CJ at p. 532; *Orr v. Isles* [1965] 83 WN (Pt 1) (NSW) 303, per Walsh J. at p. 308; *Bjelke-Petersen v. Burns & ABC* [1988] 2 Qd R. 129, per McPherson J. at p. 133). That argument is not without some force.

However, it does not persuade us that Windeyer J. was committing himself to that view. As we have already noted, Windeyer J. stated that s. 17(h) was "not a statutory counterpart of the common-law defence of fair comment". Moreover, the passage in **Salmond on Torts** to which Windeyer J. referred concerned the nature of the defence of fair comment and the distinction between fact and comment, not the requirement that comment must be based on facts truly stated (14th Edn., (1965), pp. 247-249. In relation to the requirement that the facts be truly stated, see. pp. 250-251). Further, Salmond *(ibid.*, pp. 252-253) discussed and accepted the proposition that the defence of fair comment can apply to comment on privileged but erroneous statements of facts, a proposition which stands as an exception to the general common law rule that fair comment must be based on facts truly stated.

In this respect, the common law, as it has developed in England since *Wason v. Walter*, has consistently recognized that the making of a statement of facts on a privileged occasion entitles a commentator to make a fair and honest comment on the facts so stated so long as he or she bases that comment on a fair and accurate account of the occasion on which the statement was made. Thus, in *Mangena v. Wright* [1909] 2 KB 958, the plaintiff sued on a letter in a newspaper which annexed a privileged document containing false statements in relation to the plaintiff. The letter included statements comment based on these statements. Phillimore J. said *ibid.*, at pp. 976-977:

> The plaintiff says it cannot be fair comment because it is founded on untrue statements. No doubt when there is one published

> document in which the writer partly alleges and partly comments, and of which the sum total is defamatory, the document cannot be justified unless the facts are true and the comment fair; because if the facts do not warrant defamatory comment the comment is not fair, and if the facts as alleged warrant defamatory comment they are defamatory and must be proved to be true.

However, Phillimore J. considered that this principle had no application when one person alleges the facts and another comments on the allegation, particularly when the allegation is made in a privileged document. His Lordship went on to say *ibid*., at p. 977:

> If by some unfortunate error a vote in Parliament recites, or a judge in giving the reasons of his judgment states, that which is derogatory to some person, and the charge is mistaken and ill-founded, and a newspaper reports such vote or judgment, and proceeds in another part of its issue to comment upon the character of the person affected in terms which would be fair if the charge were well founded, the newspaper which so reports and comments should be entitled to the protection of fair comment.

In these passages Phillimore J. treated the defence of fair comment as distinct from privilege on the footing that the derivative protection given to comment on privileged publication of defamatory facts comes under the heading of fair comment.

More recently, similar views have been expressed. In *Grech v. Odhams Press Ltd.*, Jenkins LJ, delivering the judgment of the Court of Appeal, said [1958] 2 QB 275, at p. 285:

> If a statement made by a witness is fairly and accurately reported, and attributed to the witness who made it, then, no doubt, although the evidence given by the witness is afterwards shown to be false, the statement reported can be made the subject of fair comment.

And in *Brent Walker Group Plc. v. Time Out Ltd.*, Bingham LJ accepted that comment could in such circumstances be based on statements which were not shown to be true, but added [1991] 2 QB 33, at p. 45:

> If the making of a statement on a privileged occasion is to entitle a commentator to treat as a fact what is not or may well not be a fact, then it seems to me that fairness to the subject of the (ex hypothesi defamatory) comment requires that the commentator should at least base his comment on a fair and accurate account of the occasion on which the statement was made.

The same approach appears to have been adopted in *Thompson v. Truth and Sportsman Ltd.* [No. 4] [1930] 31 SR (NSW) 292, at pp. 296, 297, 301; (1932) 34 SR (NSW) 21, at pp. 23-24; and see the discussion of the case in *Orr v. Isles* [1965] 83 WN (Pt 1) (NSW), per Walsh J. at pp. 309-310 by both the Supreme Court of New South Wales and the Judicial Committee.

However, in this Court, in *Bailey v. Truth and Sportsman Ltd.* [1938] 60 CLR 700, Starke J. and Dixon J. (with whom McTiernan J. agreed) expressed conflicting views with respect to the common law defence of fair comment pleaded with respect to facts stated in the report of a Royal Commission. Dixon J. proceeded on the footing that, before defamatory matter can be protected under a plea of fair comment, a basis of fact must exist *(ibid.*, at p. 720). He drew a distinction "between that which requires for its justification an independent basis of actual fact, and that which obtains a protection or immunity as fairly incident to a discussion of the report or proceedings" *(ibid*., at p. 721). In this respect, he referred *(ibid).* to the distinction made by Cussen J. in *Givens v. David Syme & Co.* (No. 2) [1917] VLR 437, at p. 445; see also *Browne v. McKinley* [1886] 12 VLR 240, per Holroyd J. at p. 243:

> between commenting upon what is said in Parliament on the basis of what in fact was said, and commenting on the basis that what is said by every member of Parliament may be taken to be true. In such a case if a defendant relies on the truth of the statements as an answer to an action for defamation, he must be prepared to prove them to be true, either on a plea of justification or as a foundation for comment.

Dixon J. said [1938] 60 CLR, at pp. 722-723:

> If the comment is directed to the antecedent state of facts and is a criticism, moral judgment, or expression of opinion thereon, it will not ordinarily be enough that the member of parliament, witness, Counsel, Judge or commissioner, expressed his belief in that state of facts. But, in discussing public statements, it must often occur that comments are made of a hypothetical or contingent character, that is, made on the avowed assumption that what has been stated is or may be well founded and made in such a way that the hypothesis forms a part of the comment. In

such cases the comment may well be excused as a fair comment upon the debate, report, or judicial statement.

He considered that to allow the defence of fair comment to extend to defamatory comment on the character or conduct of individuals based on statements made about them in the course of parliamentary, judicial or other proceedings would widen unacceptably the boundaries of freedom of expression as delimited by the established heads of privilege and expose individuals to more damaging defamation, even though their character or conduct might not itself be a matter of public interest. His Honour expressed the question and the answer in this way *(ibid.*, at p. 724):

> It is how far the liberty of commenting upon matters of public interest authorizes defamatory comments upon an individual whose conduct, whether or not intrinsically a matter of public interest, has become the subject of a public document or of public proceedings, that is, when the document or proceedings constitute matter of public interest and a copy of the document or report of the proceedings may be published without liability. So considered, I think the question should be answered that comment consisting in a moral judgment or criticism of an individual upon the basis that he has been guilty of conduct of a given description is not protected under a plea of fair comment, if his actual conduct has not been such as to make the comment allowable, although in parliamentary proceedings or documents, in judicial proceedings, or in a privileged report of a commission of inquiry, he is said to have been guilty of such conduct.

On the other hand, Starke J. thought that there was a good deal to be said for the view that a person should be entitled to the protection of fair comment if the comments were based upon the findings of fact or conclusions of Parliament or of a commission or other tribunal set up by or under statute to investigate and ascertain facts and report upon them *(ibid.*, at p. 717). This suggested right of comment related not to the individual opinions of members of Parliament or the evidence of witnesses but to the corporate act or finding of Parliament or the statutory authority, as if it had truly stated the facts. His Honour did not agree with the approach favoured by Dixon J., saying *(ibid.*, at pp. 717-718):

> [T]he proposition that comment is permissible if introduced by the hypothesis that the facts found by the tribunal may be but are not necessarily true is attractive as an academic theory but not particularly practical.

Because it deals with the common law, *Bailey* is not an authority on the interpretation of the NSW Act or the Code. However, the views expressed in *Bailey* are by no means entirely consistent with the existence of an absolute common law rule that fair comment must always be based on facts which are true.

The authorities on s. 17(h) of the NSW Act deny that the common law rule is applicable

The weight of authority on s. 17(h) of the NSW Act is against the proposition for which the appellant contends. In New South Wales, it has been held repeatedly that the general common law rule that comment to be fair must be based on facts which are true does not apply to s. 17(h) (See *Orr v. Isles* [1965] 83 WN (Pt 1) (NSW), per Walsh J. at pp . 306-315; *Cohon v. Mirror Newspapers Ltd.* [1965] 83 WN (Pt 1) (NSW) 369, per Asprey J. at p. 374; *Justin v. Associated Newspapers Ltd.* [1966] 86 WN (Pt 1) (NSW) 17, per Jacobs J.A. at p. 52; *Rigby v. Associated Newspapers Ltd.* [1966] 68 SR (NSW) 414, per Sugerman J.A. at p. 425; *Uren v. Australian Consolidated Press Ltd.* [1969] 71 SR (NSW) 29, per Sugerman J.A. at p. 42; cf. per Walsh J.A. at pp. 51-52; *Gorton v. Australian Broadcasting Commission* [1973] 22 FLR 181, per Fox J. at pp. 191-192. See also *Clines v. Australian Consolidated Press Ltd.* [1966] 84 WN (Pt 2) (NSW) 86, per Wallace P. at p. 101; *Denham v. Mirror Newspapers Ltd.* [1966] 86 WN (Pt 2) (NSW) 1, per Asprey J.A. at p. 12; Wallace P. and Walsh J.A. agreeing at pp. 3, 6). One basis of that approach is that s. 17(h), in common with the other paragraphs of s. 17, provides for a defence of qualified protection and in cases of qualified protection, as in cases of qualified privilege at common law, the truth of the defamatory matter is not ordinarily relevant. *(Justin v. Associated Newspapers Ltd.* [1966] 86 WN (Pt 1) (NSW), per Jacobs J.A. at p. 52). Thus, in *Rigby v. Associated Newspapers Ltd.*, Sugerman J.A. observed [1966] 68 SR (NSW) 414, at p. 425 (see also *Uren v. Australian Consolidated Press Ltd.* [1969] 71 SR (NSW), at p. 42):

> It is true that at common law the defence of fair comment requires that the comment be upon facts truly stated, or notorious to the writer and those persons to whom the comment is published. But in my opinion it would be contrary to the tenor of s. 17 to impose

> such a requirement upon it. In so far as s. 17 concerns itself with the truth of defamatory matter it does so under its requirement of good faith. And what is there required is not that the defamatory matter shall be in fact true but that it shall not be believed to be untrue. It appears to me that that is the proper approach to the matter of fair comment under s. 17 - not that it must necessarily be comment upon facts which are true, but that it must be comment upon facts which at least are not believed to be untrue and whose statement as facts is therefore protected, subject to other requirements of 'good faith', by the section.

This construction of s. 17(h) is consistent with the rule as to what facts provide a proper foundation for lawful comment. The rule protects comment where no actionable wrong is committed by publishing the facts. *(Orr v. Isles* [1965] 83 WN (Pt 1) (NSW), per Walsh J. at p. 308). So if, at common law, the facts are truly stated, they constitute a proper basis for comment. And if, at common law, the publication of defamatory facts is privileged, at least if the publication is the subject of absolute privilege, the publication of the facts is lawful in the sense that it is not actionable and will provide a proper basis for comment *(Wason v. Walter*; *Mangena v. Wright* [1909] 2 KB, per Phillimore J. at p. 977; *Thompson v. Truth & Sportsman Ltd.* (No. 1) [1929] 31 SR (NSW) 129; *Thompson v. Truth and Sportsman Ltd.* [No. 4] [1930] 31 SR (NSW), at p. 300; affd by the Privy Council [1932] 34 SR (NSW) 21; *Grech v. Odhams Press Ltd.* [1958] 2 QB, at p. 285; and see the discussion of the cases in *Orr v. Isles* [1965] 83 Wn (Pt 1) (NSW), per Walsh J. at pp. 308-311; and in *Brent Walker Group Plc. v. Time Out Ltd.* [1991] 2 QB, per Bingham LJ at pp. 40-45). In England, therefore, the Court of Appeal has held that, where the facts and matters relied upon to support a comment were based on a statement previously made on a privileged occasion, a defendant publisher, in order to sustain the defence of fair comment, had to meet the additional requirement ordinarily incumbent on a publisher reporting a statement made on a privileged occasion of showing that his or her report of it was fair and accurate. *(Brent Walker Group Plc. v. Time Out Ltd.* [1991] 2 QB, at p. 45).

In New South Wales, the question whether the reference to "fair comment" in s. 17(h) imported the general common law requirement that the comment be based on facts which are true was thought to be bound up with the question whether the defence of "fair comment" for which the various paragraphs of s. 15 provided likewise imported the common law requirement. So, Jacobs J.A. referred *Justin v. Associated Newspapers Ltd.* [1966] 86 WN (Pt 1) (NSW), at p. 52 to the possibility that a jury, on a plea of fair comment under s. 15, would need to consider the truth of the defamatory matter, yet under s. 17(h) the jury might be required to consider the fairness of the comment without any consideration of the question whether the matter upon which it was based was or was not true. His Honour referred to this as an "absurd possibility" and went on to suggest that "there is nothing in s. 15 which imposes the requirement of truth of the matter the subject of comment" *(ibid).* On the other hand, Street J. took the opposite view *(Mackie v. John Fairfax & Sons Ltd.* [1966] 1 NSWR 641, at p. 648), as did McPherson J. in relation to s. 375 of the Code. *(Bjelke-Petersen* [1988] 2 Qd R., at pp. 132-133).

The interpretation of s. 377(8)

The inter-relationship between s. 375 of the Code (which corresponds with s. 15 of the NSW Act) and s. 377(8) of the Code presents a similar problem. It is possible that Sir Samuel Griffith did not intend that, in order to be fair, comment must be based on facts which are true. In introducing the Bill for the 1889 Law, with reference to the precursor of s. 375, he said (Queensland, Legislative Assembly, Parliamentary Debates, 19 July 1889, p. 736):

> All that is required is that the comment should be fair. That was decided a good many years ago in England. The contrary has since been decided; but it is now generally recognised to be the better statement of the law. There is no question of privilege or malice; but simply a question of fair comment, and that is a question of fact. If malice were an ingredient in the case of a fair comment I think it would be easy to show that it might operate hardly in cases where ill-will might be found to exist.

Sir Samuel Griffith regarded malice as being irrelevant to comment. His opinion that fair comment amounted to a denial of the libel and that privilege amounted to a lawful excuse for the publication of the libel giving rise to a plea in confession and avoidance accounted for the nature of the protection provided by ss. 375 and 377 respectively. Section 375 provides that it is lawful to publish certain fair comment whereas s. 377 provides that it is a lawful excuse that defamatory matter is published on an occasion

of privilege qualified by the requirement of "good faith". Section 375, unlike s. 377, contains no element of "good faith".

In this case, it is not necessary to decide whether the defence of fair comment under s. 375 requires that the comment be based on facts which are true. It is sufficient to deal with the question which arises for decision under s. 377(8), notwithstanding the argument that the treatment of the two sections should be symmetrical. So far as s. 377(8) is concerned, the arguments based on legislative history and precedent convince us that the reference to "fair comment" in that sub-section does not import a requirement of the kind suggested by the appellant. It is plain that neither the 1889 Law nor the Code was framed with a view to departing from the common law as stated in *Wason v. Walter*. It is equally plain that, in New South Wales, the interpretation for which the appellant contends has been consistently rejected. The correct approach, in our view, to s. 377(8) is that expressed by Sugerman J.A. in *Rigby v. Associated Newspapers Ltd.* [1966] 68 SR (NSW), at p. 425.

It would be a curious construction to attribute to s. 377(8) that the excuse which that sub-section confers on the publication of defamatory matter is lost if that matter consists of statements of fact and fair comment thereon and the statements of fact, though published in good faith, turn out to be untrue. But the facts may not be stated in the defamatory publication. Nevertheless, the excuse which the sub-section affords to the publication of a defamatory fair comment is not lost by the absence of a statement of the facts on which the comment is based provided the jury is satisfied that the facts on which the comment is based are sufficiently indicated or notorious to enable persons to whom the defamatory matter is published to judge for themselves how far the opinion expressed in the comment is well founded *(Kemsley v. Foot* [1952] AC, at p. 356). If the publication of defamatory matter is to be excused as fair comment under s. 377(8), the reader must be enabled to judge for himself or herself whether it is fair. In *Uren v. Australian Consolidated Press Ltd.* [1969] 71 SR (NSW), at pp. 34, 42, 52, the New South Wales Court of Appeal rejected the defence based on s. 17(h) of the N.S.W. Act on the ground that there was no evidence of facts by reference to which the fairness or unfairness of the comment could be determined. Accordingly, s. 377(8) provides protection if the facts on which the comment is and can be seen to be based *(Rigby v. Associated Newspapers Ltd.* [1966] 68 SR (NSW), at p. 425; *Uren v. Australian Consolidated Press Ltd.* [1969] 71 SR (NSW), at p. 42. See also *Kemsley v. Foot)* are not believed to be untrue and the statement or indication of the facts as such is protected by the section, subject to the requirements of "good faith" and the other requirements of the section. Those requirements include the fairness of the comment and the relevance of the comment to the privileged occasion.

The considerations to which Dixon J. adverted in *Bailey v. Truth and Sportsman Ltd.* [1938] 60 CLR, at pp. 721-724 suggest that, as a matter of policy, the protection given by s. 377(8) may not sufficiently safeguard the interests of an individual who is incidentally disparaged in the course of public discussion of a matter of public interest which falls within the sub-section. However, that insufficiency, assuming it to be so, is not enough in itself to warrant a departure from an interpretation which is so strongly supported by legislative history and authority. Moreover, it is an interpretation which rests on the paramount importance of encouraging and protecting freedom of expression and discussion, especially in relation to matters of public interest. In the context of the common law defence of fair comment, Lord Denning M.R. described it as "one of the essential elements which go to make up our freedom of speech". *(Slim v. Daily Telegraph Ltd.* [1968] 2 QB 157, at p. 170).

When the paramount policy interest manifest on the face of s. 377(8) is the encouragement and protection of freedom of discussion on a matter of public interest for the benefit of the public, it would be inappropriate to construe that sub-section as requiring that a person wishing to participate in the discussion of such a matter by way of comment on facts stated on a privileged occasion, when that discussion is for the public benefit, should first satisfy himself or herself of the truth of those facts before commenting upon them.

Does s. 377(8) require that the publisher hold the opinion expressed in the defamatory publication?

The appellant submits that this question should be answered in the affirmative. He argues that this is a requirement of the common law defence of fair comment and one which applies to the use

of the term in s. 377(8). As to the former limb of his argument, he relies upon the majority decision of the Supreme Court of Canada in *Cherneskey v. Armadale Publishers Ltd.* [1978] 90 DLR (3d) 321. In that case the defendants were the editor and the owner and publisher of a newspaper which had published a letter to the editor in which the writers accused the plaintiff of holding racist views. The writers of the letter did not give evidence. The defendants in their evidence made it clear that the letter's content did not represent the honest expression of their own views. The trial Judge refused to leave the defence of fair comment to the jury and the Supreme Court, by a majority of 6:3, upheld the decision of the trial Judge. In our view, the common law position is correctly stated by Dickson J. in his dissenting judgment, with which Spence and Estey JJ. agreed. It is sufficient if the publication is objectively fair and the plaintiff does not prove that the defendant publisher was actuated by malice. With reference to the proposition for which the appellant contends in the present case, Dickson J. said *(ibid.*, at p. 343):

> It does not require any great perception to envisage the effect of such a rule upon the position of a newspaper in the publication of letters to the editor. An editor receiving a letter containing matter which might be defamatory would have a defence of fair comment if he shared the views expressed, but defenceless if he did not hold those views. As the columns devoted to letters to the editor are intended to stimulate uninhibited debate on every public issue, the editor's task would be an unenviable one if he were limited to publishing only those letters with which he agreed. He would be engaged in a sort of censorship, antithetical to a free press.

Subsequently, in *Telnikoff v. Matusevitch* [1992] 2 AC 343, the House of Lords refused to follow *Cherneskey*. Lord Keith of Kinkel, with whom the other members of the House of Lords (except Lord Ackner who dissented on another point) agreed, expressed his preference for the minority view in *Cherneskey (ibid.*, at p. 355). As Gatley observes, **(Libel and Slander,** 8th Edn., (1981), par. 730, n. 51, pp. 313-314), the ordinary case is best understood in the words of Farwell LJ in *Dawson v. Dover Chronicle* [1913] 108 LT 481, at p. 485:

> The plea of fair comment is not the newspaper's plea: it is the adoption by the newspaper of the speaker's protection of fair comment.

While the formulation of Dickson J. cannot be applied directly to s. 377(8), our view is that under the Code it is sufficient if the publication is made in good faith and is objectively fair.

Accordingly, we reject the appellant's submission on this point.

Application of s. 377(8) in the present case

At the trial, Counsel for both parties submitted that the question of the fairness or otherwise of so much of the publication as consisted of comment was for the trial Judge. On any view as to what part or parts of the publication consisted of comment, that comment was fair. As Thomas J. noted in the Full Court, it is not to the point that, with hindsight, it is shown to be untrue. Implicit in our acceptance of this conclusion is a rejection of the appellant's final contention that, if the whole of the publication consisted of comment, there were no facts relevantly stated or indicated on which it was based. There was a clear substratum of fact on which the publication was based, consisting of the statements made in Parliament, and that is all that is required. *Uren v. Australian Consolidated Press Ltd.* [1969] 71 SR (NSW) 29 has no application because in that case no identifiable substratum of fact was established by the evidence.

The appellant also argues that the Full Court was in error in concluding that there was no evidence of the absence of good faith. Under s. 378 the burden of proof of absence of good faith was on the appellant. The Full Court held that there was no evidence of absence of good faith fit for consideration by the jury. We agree. Under s. 377, in order to prove absence of good faith, it was necessary for the appellant to falsify any one of the following propositions:

(1) that the material published was relevant to the matters raised in the plea under s. 377(8);
(2) that the manner and extent of the publication did not exceed what was reasonably sufficient for the occasion;
(3) that the first respondent was not actuated by ill will to the appellant, or by any other improper motive, and did not believe the defamatory matter to be untrue.

It is convenient to consider proposition (3) first. There was no evidence of any ill will or other improper motive on the part of the officers of the first respondent towards the appellant. Nor was there any evidence that a director of the first

respondent, said to be antagonistic to the appellant, had any connection whatsoever with the publication of the advertisement by the newspaper. Nor was there anything to suggest that anyone connected with the newspaper believed the contents of the advertisement to be untrue. Indeed, as Thomas J. pointed out, there was no evidence that the first respondent through its employees believed or disbelieved the contents of the advertisement. All that happened was that the advertisement was published by the newspaper in accordance with its ordinary procedures applicable to the publication of advertisements. There was, therefore, no evidence capable of falsifying proposition (3).

In relation to proposition (2), the appellant argued that the extent of the publication exceeded what was reasonably sufficient for the occasion in that the first respondent's newspaper circulates in an area which extends beyond the area of the Johnstone Shire into neighbouring shires. This submission is utterly without merit. It is obvious that what happens in the Johnstone Shire, in particular the administration of the Johnstone Shire Council, is a matter of public interest to persons resident outside the shire. It is equally obvious that some ratepayers of the shire would reside outside the shire boundaries. And there is nothing to suggest that publication of the advertisement in any newspaper or journal other than the first respondent's newspaper would have succeeded in bringing the matter sufficiently to the attention of the ratepayers and residents of the shire.

No submission was made to challenge proposition (1).

Accordingly, the appeal must be dismissed.

McHugh J:
The questions in this case are:

(1) Were defamatory statements made concerning the plaintiff fact or comment?
(2) If comment, does s. 377(8) of the Criminal Code (Q) protect defamatory comment based on facts which do not appear in the publication?
(3) If s. 377(8) does protect comment on facts not contained in the publication, was the defence made out in this case?

In my opinion the appeal should be allowed because the defamatory material was comment and s. 377(8) does not protect comment made, as this comment was, on facts not contained in the publication that is the subject of the action.

Factual background

The appeal is brought by a plaintiff against an order of the Full Court of the Supreme Court of Queensland which set aside a verdict which the plaintiff had obtained from a jury in an action for defamation. The Full Court entered a verdict in the action for the defendant.

The plaintiff was at all material times a member of the Johnstone Shire Council and Chairman of the Works Committee of that Council. The defendant is the proprietor of the *Innisfail Advocate*, a newspaper which has a large circulation in and around Innisfail. On 5 August 1986, Mr. Max Menzel M.L.A., a Member of the Legislative Assembly of Queensland, made a speech attacking the conduct of the plaintiff. Mr. Menzel alleged that, in order to facilitate the building by the plaintiff of an industrial complex in Innisfail, the plaintiff had ordered Council staff to cut down trees to enable the complex to be seen more clearly from the road and that he had ordered the staff to fill a reserve so that a roadway to the complex could be built. Mr. Menzel alleged that the work was paid for by using funds allocated for disaster relief work. He further alleged that, when Council staff challenged the plaintiff's orders, the plaintiff had intimidated the staff by threatening that they would lose their jobs if they refused to carry out the instructions. Mr. Menzel said that the Johnstone Shire Council was involved in the misappropriation of funds and that the plaintiff was feathering his own nest by using taxpayer's money to further his business interests.

On 7 and 9 August 1986, the defendant published a report of Mr. Menzel's allegations and replies to those allegations by the Council, various councillors and the plaintiff's brother. No complaint is made about this reporting. However on 12 August, an advertisement appeared in the Innisfail Advocate. The advertisement was placed in the public notices section of the classified advertisements section of the Innisfail Advocate by Mr. Herbert Layt. The advertisement contained four sentences:

> Councillors feathering their own nests? Funds being misappropriated? This is doing irreparable [sic] damage to the image of our shire. It is now more important than ever to attend the ratepayers and residents meeting at the

Grand Central Hotel, Tuesday, 12 August at 8.00 p.m.

The plaintiff sued the defendant and Mr. Layt for defamation. In its defence, the defendant raised, *inter alia*, defences of fair comment and qualified protection pursuant to ss. 377(5) and 377(8) of the Criminal Code. The trial Judge withdrew both defences from the jury which found that the advertisement was published of and concerning the plaintiff and that it was defamatory of him. The jury awarded him damages, which, with interest added, amounted to $6,040.

The defendant appealed to the Full Court of the Supreme Court of Queensland. One ground was that the trial Judge erred in ruling that the defence under s. 377(8) of the Criminal Code could not go to the jury. The Full Court upheld this ground and also held that, on the evidence, the defence under s. 377(8) was made out. The Full Court entered judgment for the defendant.

The Code provisions

Section 377(8) provides that it is a lawful excuse for the publication of defamatory matter:

> If the publication is made in good faith in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit, and if, so far as the defamatory matter consists of comment, the comment is fair.

Section 377 also provides that:

> For the purposes of this action, a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter; if the manner and extent of the publication does not exceed what is reasonably sufficient for the occasion; and if the person by whom it is made is not actuated by ill-will to the person defamed, or by any other improper motive, and does not believe the defamatory matter to be untrue.

Where the publication of defamatory matter is made under circumstances which would provide lawful excuse for the publication, the onus rests upon the plaintiff to prove absence of good faith: s. 378.

"Defamatory matter" is defined by s. 366:

> Any imputation concerning any person, or any member of his family, whether living or dead, by which the reputation of that person is likely to be injured, or by which he is likely to be injured in his profession or trade, or by which other persons are likely to be induced to shun or avoid or ridicule or despise him, is called defamatory, and the matter of the imputation is called defamatory matter.

The reference to "defamatory matter" in s. 377(8), therefore, is a reference to the imputations arising from the publication.

Fact or comment

For the reasons given by Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ., the defamatory matter consisted of comment and not statements of fact.

The construction of s. 377(8)

I also agree with their Honours that s. 377(8) protects fair comment made on **defamatory** facts that are published in the course of or for the purposes of the discussion of some subject of public interest without the need to prove the truth of those facts. However, I do not agree that s. 377(8) protects comment made on non-defamatory facts published in the course of or for the purposes of the discussion of a subject of public interest. Nor do I agree that s. 377(8) protects comment made on facts which are not published in the course of or for the purposes of such a discussion.

A construction of s. 377(8) which would protect any comment made in the course of or for the purposes of the discussion of a subject of public interest, irrespective of whether the basis of the comment was published in the course of or for the purposes of the discussion or was itself defamatory, is inconsistent with the language of the sub-section. At all events such an interpretation cannot be made consistently with the section unless the term "fair comment" is given a meaning contrary to any previous understanding of the term. Further, as I will attempt to show, if defamatory comment is protected under s. 377(8) when it is made on facts outside the publication or on non-defamatory facts, the provisions of s. 377 dealing with good faith will have little, if any, scope for operation in relation to those facts.

Furthermore, such an interpretation will render the s. 375 defence of fair comment practically superfluous. Section 375 provides that it is lawful to publish a fair comment respecting various subjects. In s. 375, it seems obvious that fair comment has its common law meaning. All of the subjects referred to in s. 375 answer the

description of subjects of public interest. A subject which can be the basis of comment under s. 375, therefore, is a subject of public interest under s. 377(8). However, at common law a defamatory comment made on untrue facts cannot be a fair comment *(Digby v. Financial News Ltd.* [1907] 1 KB 502, at p. 508). In *Digby v. Financial News Ltd.* at p. 508, Collins M.R. said: "If the defendant makes a misstatement of any of the facts upon which he comments, it at once negatives the possibility of his comment being fair." It follows that a comment on untrue facts cannot be a fair comment for the purpose of s. 375. Consequently, if s. 377(8) applies to comment on non-defamatory facts or on facts outside the publication as well as defamatory facts in the publication, and a defendant does not have to prove the truth of those facts before the comment can be adjudged fair, the conventional defence of fair comment will have little scope for operation.

No defendant would wish to rely on s. 375 to defend a defamatory comment if the comment could be defended under s. 377(8) without having to prove the truth of the factual basis of the comment. Consequently, the defence of a comment under s. 375 will probably be confined to those cases where the public discussion of the subject of public interest under s. 377(8) was not for the public benefit. Perhaps some matters concerned with national security might be outside s. 377(8) but protected by s. 375. In days gone by, perhaps the courts might have held that the use of contraceptive devices, although a subject of public interest, was not a subject the discussion of which was for the public benefit *(cf. Sutherland v. Stopes* [1925] AC 47, at pp. 55, 67-68, 70). But the scope of operation of s. 375 will be very limited.

It seems most unlikely that, in adding the words "and if, so far as the defamatory matter consists of comment, the comment is fair" to s. 377(8) in 1899 (The Criminal Code (Q.) largely adopts the provisions of the Defamation Law of Queensland 1889 (Q.), s. 17 of which provided:

> It is a lawful excuse for the publication of defamatory matter -
>
> ...
>
> (8) If the publication is made in good faith in the course of, or for the purposes of, the discussion of some subject of public interest the public discussion of which is for the public benefit)

the legislature intended to make the conventional defence of fair comment largely superfluous. On the contrary, it is arguable that the addition of these words was intended to make all the common law rules relating to fair comment apply to all comment which was published on a s. 377(8) occasion. But, however that may be, the ordinary rules of statutory construction compel the conclusion that s. 377(8) does not apply to defamatory comment based on non-defamatory facts or on facts which were not published in the course of or for the purposes of a relevant discussion. So far as possible, a Court should avoid construing a statutory provision in a manner which produces anomalies or causes the application of the provision in various situations to be inconsistent with paradigmatic illustrations of applying the provision or which renders **parts** of the provision inapplicable to many situations which, on that construction, would be within the paragraph. In my view, each of these consequences flows from a construction of s. 377(8) which holds that a comment can be fair comment for the purpose of the sub-section if it is based on facts believed to be true, irrespective of whether the facts are defamatory or non-defamatory or contained in the publication. Furthermore, a construction of s. 377(8) which makes an honest belief in non-defamatory facts or an honest belief in facts outside the publication a condition of the defence finds no support in the text of s. 377. To make good these assertions, it is necessary to examine the practical operation of the defence of fair comment in various situations.

In practice, a defamatory comment may arise in one of four situations:

1. The comment may be based on defamatory facts that are published with the comment.

As I have said, I agree with the proposition that, if the defamatory facts are protected by s. 377(8), so is any defamatory comment that is based upon them. At common law, the general rule was that the defendant had to prove the truth of every fact which was the basis of the comment *(Peter Walker & Son Ltd. v. Hodgson* [1909] 1 KB 239, at pp. 250, 254, 256-257; *Digby* [1907] 1 KB, at p. 508). However, it was held in Wason v. *Walter* [1868] LR 4 QB 73 and *Thompson v. Truth and Sportsman Ltd.* [No. 4] [1932] 34 SR (NSW) 21, at pp. 23-24 that, where a defamatory comment is based on defamatory facts which are published on a privileged occasion, the

defendant is not required to prove the truth of those facts. If the publication of defamatory facts is protected by s. 377(8), it would accord with those authorities to hold that a comment on those facts could be fair although the facts were untrue. On this point, I agree with the majority judgment.

2. The comment may be based on non-defamatory facts which are published with the comment.

In *Mangena v. Wright* [1909] 2 KB 958, at p. 977, Phillimore J. said that "if the facts as alleged warrant defamatory comment they are defamatory and must be proved to be true". However, in many perhaps even the majority of fair comment cases, the facts alleged to justify the comment are not defamatory. In many cases, the defamatory comment will consist of a comment impugning the skill, reliability or competence of the plaintiff and will be based on statements, policies or actions for which the plaintiff is responsible. A critical review of a book or play is the paradigm case of fair comment. More often than not, any defamatory comment will be based on a description of the contents of or extracts from the work which the critic sets out in the review (See for example, *Gardiner v. John Fairfax & Sons Pty. Ltd.* [1942] 42 SR (NSW) 171). Defamatory comments concerning politicians and public figures are also frequently based on their own statements or on non-defamatory actions or policies for which they are responsible. Thus, a politician may declare during an election campaign that his or her government will not impose any new taxes. When elected, the government may impose a new tax. A statement that the politician is dishonest may be regarded by a jury as comment and, having regard to the promise and the imposition of the tax, as fair comment.

The defendant argued that comment made on non-defamatory facts can be defended under s. 377(8) provided that the commentator has an honest belief in those facts. But the terms of s. 377 and the definition of "defamatory matter" compel the rejection of this construction of the paragraph. Section 377 protects the publication of "defamatory matter". By definition, defamatory matter is the defamatory imputation. Consequently, when the published facts which form the basis of the comment are not defamatory, they are not protected by s. 377(8). That subsection is concerned with the protection of defamatory facts and defamatory comments published in the course of or for the purposes of a relevant discussion. It is not concerned with the publication of non-defamatory facts. Nothing in s. 377(8) gives any ground for concluding that that sub-section protects comment on non-defamatory facts. Indeed, the terms of s. 377(8) and the definition of good faith in s. 377 show conclusively that s. 377(8) is not dealing with a case of comment on non-defamatory facts.

First, the words "and if, so far as the defamatory matter consists of comment, the comment is fair" in s. 377(8) suggest that the sub-section is not concerned with defamatory comment *per se.* Its principal concern is with the publication of defamatory facts. Only as a concomitant of the publication of defamatory facts is the sub-section concerned with comment. On this view, if no defamatory facts are published, no question of defending defamatory comment under s. 377(8) arises. The defendant must rely on s. 375 to defend a comment on non-defamatory facts.

Secondly, the definition of "good faith" in s. 377 tells heavily - I would say conclusively - against the proposition that comment based on non-defamatory facts can be adjudged fair unless it is proved that the defendant believed that the non-defamatory facts were untrue. Every part of the definition of good faith is concerned with the defamatory matter. A key element of good faith is the requirement that the defendant must not have believed in the untruth of the defamatory matter. However, nothing in the definition gives any credence to the notion that the defendant's **belief in non-defamatory facts** is an issue under s. 377(8). Indeed, having regard to the terms of the sub-section, the **truth of non-defamatory facts** could never be an issue. Of course, proof that the stated facts were untrue and that the defendant knew or believed that they were untrue would be evidence that the defendant believed the defamatory comment "to be untrue" for the purpose of the definition. But a defendant might well believe in the "truth" of the comment even though he or she had deliberately falsified the facts. Thus, a critic might honestly believe that a play was very bad yet seek to support a comment to that effect by misrepresenting some of the facts. If s. 377(8) applies to comment based on non-defamatory facts, the defence could succeed even though the defendant had misrepresented the facts.

Moreover, if s. 377(8) applies to comment based on non-defamatory facts, a defendant who made a comment on falsely stated non-defamatory facts would be in a better position in respect of the comment than a person who made a comment on falsely stated defamatory facts. Proof that the defendant knew that the defamatory facts were untrue would automatically destroy the defence of fair comment under s. 377(8). Proof that the defendant knew non-defamatory facts were untrue would not automatically destroy the defence of fair comment under s. 377(8). It is difficult to believe that the legislature could have intended such a paradoxical result.

Furthermore, if a comment on non-defamatory facts could be protected by s. 377(8), the plaintiff would not be able to prove an absence of good faith in relation to the publication of those facts by relying on other parts of the definition of good faith in s. 377 - relevance, manner and extent, and improper motive. Those heads of good faith are related to the publication of the defamatory imputation, not the publication of its general content. Consequently, if s. 377(8) protects defamatory comment based on non-defamatory facts, the defence will succeed even though those facts were irrelevant to the discussion, or the manner and extent of their publication went beyond what was reasonably necessary for the occasion or those facts were published with an improper motive. With great respect to those who hold the opposite view, I cannot accept that the legislature ever contemplated that the defence under s. 377(8) would cover such a case.

Relevance, manner and extent, and improper motive are key elements in the legislature's attempt to strike a balance between protection of reputation and freedom of expression. Where defamatory comment is involved in a situation to which s. 377(8) applies, relevance is of particular significance. Fair comment does not mean reasonable comment, it means that "it is the honest expression of the commentator's real view" *(Turner v. M-G-M Pictures Ltd.* [1950] 1 All ER 449, per Lord Porter at p. 461) on the facts which are the basis of the comment. Thus, when defamatory comment is involved in a situation to which s. 377(8) applies, it is important that the basis of the comment as well as the comment be "relevant to the matters the existence of which may excuse the ... defamatory matter". Otherwise an honest comment based on facts which are irrelevant to the discussion might be protected by s. 377(8).

If that sub-section is confined to comment on defamatory facts published with the comment, the facts must always be relevant. But if the defence extends to comment on non-defamatory facts, those facts need not be relevant since s. 377(8) is not concerned with non-defamatory facts. Suppose, in the course of discussing who should be appointed to be the Director-General of A.S.I.O., the defendant claims that a particular candidate is not a fit and proper person to be appointed, the ground of the defamatory comment being the false assertion that 20 years before the candidate had been the Secretary of a Socialist Party. Assuming that to say that a person is or has been a socialist is not defamatory (As was conceded in *Slatyar v. Daily Telegraph Newspaper Co. Ltd.* [1908] 6 CLR 1) the basis of the comment is a non-defamatory "fact". A tribunal of fact might well conclude the defendant honestly held the view that the candidate was not a fit and proper person to be the Director-General even though membership of the Socialist Party so long ago was not in fact relevant to the appointment. If s. 377(8) applies to comment based on non-defamatory facts, the defence will succeed because the definition of good faith is not concerned with non-defamatory facts. Yet if the defendant had said that the candidate was an **incompetent** Secretary of a Socialist Party, the defence would fail if the tribunal of fact thought that the basis of the comment was defamatory and irrelevant to the discussion.

However, the argument for the defendant maintained that, because the sub-section is intended to protect honest defamatory comment published in the course of or for the purposes of a relevant discussion, the legislature must surely have intended that the protection will not be lost if the comment was made on non-defamatory facts which were false but believed to be true. But, as I have attempted to show, this claim is not based on the terms of the sub-section. Furthermore, belief in facts has never been a criterion of fair comment. The facts which are the basis of the comment must be either true or privileged or, in the Code States, protected. In s. 377(8), belief in the untruth of the factual basis will defeat the defence of fair comment when the comment is made on facts which are protected by that sub-section. But this is because proof that the defendant believed the "protected" facts to be untrue or was otherwise actuated by an absence of good faith defeats the occasion of qualified protection. In that

situation, the facts are no longer protected. If they are untrue, the defence of fair comment must fail. But belief in the untruth of non-defamatory facts is not an issue under s. 377(8).

Accordingly, in my opinion, s. 377(8) has no application where the defamatory comment is based on non-defamatory facts which are published with the defamatory comment. That class of case cannot be fitted into the scope or purpose of the sub-section. It must stand or fall on the application of the defence of fair comment under s. 375 which is its natural home.

3. The defamatory comment may be based on facts which are not published in the article.

This is often the case where a play or sporting spectacle is being reviewed, but it is certainly not limited to plays or spectacles. To raise the defence of fair comment in this class of case, it is sufficient that either expressly or by implication the defendant has identified the subject-matter of the comment. The defence is available even though the publication does not state or indicate the facts which form the basis of the comment. As long as the subject-matter of the comment is identified, the defendant is entitled to the benefit of the defence of fair comment if he or she is able to prove one or more facts which will justify the comment *(Kemsley v. Foot* [1952] AC 345, at pp. 358, 362). The difference between identifying the subject-matter or substratum of fact of the comment and the facts which justify the comment is vital. The comment must indicate the subject-matter or substratum of fact of the comment, but the defence does not fail because the publication does not indicate the individual facts which are the basis of the comment. It is the "substratum" of fact *(ibid.,* at p. 356) not the individual facts which must be identified. If a critic states that a professional footballer played badly and the jury holds that the statement is comment, the critic is entitled to rely on any fact which will support that comment even though the fact is not stated in the article or notorious and no reader saw the game. The distinction between the subject-matter or the substratum of fact and the facts which justify the comment is drawn out in two illuminating passages in the speech of Lord Porter in *Kemsley v. Foot* [1952] AC 345.

The first states *(ibid.,* at p. 357):

> the inquiry ceases to be - Can the defendant point to definite assertions of fact in the alleged libel upon which the comment is made? and becomes - Is there subject-matter indicated with sufficient clarity to justify comment being made? and was the comment actually made such as an honest, though prejudiced, man might make?

The second states *(ibid.,* at pp. 357-358. Lord Tucker expressly agreed (at p. 362) with this passage in Lord Porter's speech):

> In a case where the facts are fully set out in the alleged libel, each fact must be justified and if the defendant fails to justify one, even if it be comparatively unimportant, he fails in his defence. Does the same principle apply where the facts alleged are found not in the alleged libel but in particulars delivered in the course of the action? In my opinion, it does not. Where the facts are set out in the alleged libel, those to whom it is published can read them and may regard them as facts derogatory to the plaintiff; but where, as here, they are contained only in particulars and are not published to the world at large, **they are not the subject-matter of the comment but facts alleged to justify that comment.**
>
> In the present case, for instance, **the substratum of fact upon which comment is based is that Lord Kemsley is the active proprietor of and responsible for the Kemsley Press.** The criticism is that that press is a low one. As I hold, any facts sufficient to justify that statement would entitle the defendants to succeed in a plea of fair comment. Twenty facts might be given in the particulars and only one justified, yet if that one fact were sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not of necessity defeat the defendants' plea.
> (my emphasis)

Equally illuminating is a passage in the speech in Lord Oaksey *(ibid.,* at p. 361):

> A defendant who has made a defamatory comment on a matter of public importance must be entitled to adduce any relevant evidence to show that the comment was fair, and in order to do so must be entitled to allege and attempt to prove facts which he contends justify the comment. Whether the facts alleged are satisfactorily proved or not, it will still be for the jury to say whether they consider that the comment in the circumstances proved might have been made by an honest man.

Fair comment in the *Kemsley* situation is very different from what may be called the conventional case of fair comment. In the conventional

case, the basis of the comment appears in the publication. The reader is able to judge whether the facts justify the comment. Once the defendant proves the facts which are the basis of the comment, that person is entitled to the benefit of the defence unless the opinion expressed by the defendant was not honestly held. But in a situation such as that in *Kemsley*, the reader does not know what facts were the basis of the comment. Unless litigation ensues, the reader will never know what particular facts the defendant had in mind. Moreover, as the second passage from the speech of Lord Porter makes plain, the defence may succeed even though some or most of the "facts" which the defendant had in mind were untrue.

If the facts forming the basis of the comment always had to be drawn to the reader's attention, effective comment on many subjects would be frustrated. No doubt, it is for this reason that the common law provides for a defence of fair comment if the subject-matter or "substratum of fact" of the comment is sufficiently indicated without requiring that the particular facts justifying the comment be set out or indicated. The plaintiff's protection is found in the rule that the defence will fail unless the defendant proves the truth of sufficient facts to justify the comment.

But if s. 377(8) applies to a case where the facts allegedly supporting the comment are outside the publication, the plaintiff will have no such protection. Take the facts of *Kemsley*. If the argument of the defendant in this case is accepted and s. 377(8) applies, the defendant in a situation such as that in *Kemsley* could succeed although the basis of the comment did not exist. If the publication indicated the substratum of fact or subject-matter - that Lord Kemsley is the active proprietor of and responsible for the Kemsley Press - the defendant would only have to show that he or she honestly believed that there were "facts" outside the publication which justified the implied comment that Lord Kemsley's press was a low one. Those facts would not be known to and, ex hypothesi, since they do not exist, could not be ascertained by the reader. Moreover, the "facts" would not be published in the course of or for the purposes of the discussion of a subject of public interest, the public discussion of which is for the public benefit. That is to say, they are neither true nor protected. It is a remarkable proposition that a comment can be fair although it is based on statements or events which did not occur, which are not published or capable of being ascertained and whose existence is neither presumed by law nor the subject of a privileged or protected communication.

If the argument of the defendant is accepted, it is difficult to see how the words "the comment was fair" add anything of substance to s. 377(8). If the last limb of s. 377(8) was not there, the defence would fail in any event if it was proved that the defendant did not believe in the truth of the comment. It is true that, if the argument of the defendant is accepted, the words "if ... the comment is fair" mean that the defence will also fail if the defendant did not believe the truth of the facts on which the comment is based. But in a case where the defendant has not published the "facts", it is difficult to see any practical distinction between a belief in the truth of a comment and a belief in the truth of facts which are the basis of an honest belief in the truth of a comment. It seems unlikely that a person who did not publish any "facts" would have an honest belief in a published comment, but, in his or her mind, would have a belief in the untruth of the facts which were the basis of the honest belief in the comment.

In *Uren v. Australian Consolidated Press* [1969] 71 SR (NSW) 29, the New South Wales Court of Appeal correctly held that a defence of fair comment based on the provisions of s. 17(h) of the Defamation Act 1958 (NSW), the NSW equivalent of s. 377(8), could not succeed when the defendant failed to identify any facts which could support the comment. Wallace P. also said *(ibid.,* at p. 32) that in his opinion there is "room for argument that material which is exclusively comment does not warrant a defence based on s. 17(h) and that s. 15 [the NSW equivalent of s. 375] (if otherwise apt) is an appropriate defence, but this is for another day". Walsh J.A. said *(ibid.,* at p. 51) that he was of the opinion "that the plea by the defendant in this action, based upon s. 17(h) of the Act, could not succeed unless some facts were placed before the jury concerning the plaintiff's political life, by reference to which a judgment could be made as to the fairness of the comments". Later his Honour said *(ibid.,* at pp. 51-52):

> It was contended for the defendant, however, that elsewhere in the article in which the words sued upon in the first count appeared, there were statements of fact, and these provided a basis for the comments, which could be found to be fair as comments on those

> facts. It was said that it was not necessary, for the purposes of s. 17(h), for the defendant to prove the truth of those facts and that it was sufficient if the comment could be found to be fair on the assumption that those facts were truly stated. See *Rigby v. Associated Newspapers Ltd.* [1966] 68 SR (NSW) 414, at p. 425; 86 WN (Pt 2) (NSW) 159, at pp. 167-168. But, in my opinion, the argument for the defendant fails, for the reason that what was contained elsewhere in the article did not amount to a statement of any facts sufficient to provide a basis for the comments sued upon.

It would seem that Walsh J.A. was of the view that, if s. 17(h) applies to defamatory comment based on facts outside the article, the defendant must prove the truth of sufficient facts to justify the comment. However, the other member of the Court - Sugerman J.A. - expressly held that s. 17(h) was "available as a defence where the defendant relies entirely on comment [1969] 71 SR (NSW) 29, at p. 43. This was in accord with what his Honour had said in the earlier case of *Rigby v. Associated Newspapers Ltd. (ibid.,* at p. 425; pp. 167-168 of 86 WN (Pt 2) (NSW)):

> It is true that at common law the defence of fair comment requires that the comment be upon facts truly stated, or notorious to the writer and those persons to whom the comment is published. But in my opinion it would be contrary to the tenor of s. 17 to impose such a requirement upon it. In so far as s. 17 concerns itself with the truth of defamatory matter it does so under its requirement of good faith. And what is there required is not that the defamatory matter shall be in fact true but that it shall not be believed to be untrue. It appears to me that that is the proper approach to the matter of fair comment under s. 17 - not that it must necessarily be comment upon facts which are true, but that it must be comment upon facts which at least are not believed to be untrue and whose statement as facts is therefore protected, subject to other requirements of 'good faith', by the section.

Three comments should be made on this passage. First, the reference to the requirement that at common law the comment must be upon "facts truly stated, or notorious to the writer and those persons to whom the comment is published" is misleading. It suggests that, if the facts which justify the comment are not truly stated, they must be notorious to the reader. It is true that such a suggestion is sometimes made. But it is erroneous. If it was the law, no comment could be made on the public performance of a singer, actor or sports person without setting out the facts which justify the comment except in those cases where the facts of the performance were notorious. As the speeches of Lords Porter and Oaksey in *Kemsley* make clear, it is the subject-matter or substratum of fact which must be indicated or notorious, not the detailed facts which will support the comment. It is difficult to resist the conclusion that Sugerman J.A. thought that s. 17(h) could apply to any defamatory comment, whatever its basis, because the facts which justify the comment must be in the publication or notorious or indicated by the publication. If his Honour had recognised that the facts which justify the comment need not be in the publication or notorious or sufficiently indicated, I doubt that he would have reached the conclusion which he did.

Secondly, although Sugerman J.A. recognises that good faith under s. 17 is concerned only with defamatory matter, his Honour's judgment seems to assume that the basis of the comment is always defamatory matter. He does not deal with the issue of comment on non-defamatory matter. Furthermore, while his Honour must have had in mind a defamatory comment, based on facts outside the publication, his judgment does not explain how the definition of good faith in s. 17 - which is the same as in s. 377 of the Queensland legislation - can apply to them. Thirdly, nothing in the subsection gives any support for the conclusion that the defendant's belief or non-belief in non-defamatory facts is an element of the defence. On the contrary, the definition of defamatory matter shows conclusively that it is not. When the defamatory matter consists entirely of defamatory facts, belief or non-belief in non-defamatory facts is not an issue raised by the sub-section. How can the position be different when the defamatory matter consists of comment and not fact?

The views expressed by Sugerman J.A. in *Rigby* were largely repeated in *Uren* [1969] 71 SR (NSW) at p. 42 when he said:

> It is of the essence of comment that it should be comment upon facts. These may be, but need not necessarily be, stated in the matter sued upon; it is sufficient that the facts upon which the comment is made should be notorious or sufficiently indicated (*Kemsley v. Foot*). But a substratum of fact there must be. If matter is to be classified as comment the reader must be put into a position in which he is enabled

to judge for himself whether the comment is well-founded - **Odgers on Libel and Slander** 6th Edn., at p. 166, quoted with approval by Lord Porter in *Kemsley v. Foot* [1952] AC, at p. 356.

This passage indicates even more clearly than the passage in *Rigby* that his Honour thought that the facts which are the basis of the comment must be "notorious or sufficiently indicated" if they are not set out in the publication. But, as I have pointed out more than once, it is the subject-matter of the comment which must be notorious or sufficiently indicated. The overall effect of this passage from his Honour's judgment seems to be that his Honour thought that the subject-matter or substratum of fact of the comment and the facts which justify the comment are identical. Curiously, he cites *Kemsley* and Lord Porter's citation of the passage from **Odgers on libel and Slander** as authority for these propositions. The passage from Odgers was part of a long passage from that work which Lord Porter cited *(Kemsley* [1952] AC, at pp. 356-357) when he was dealing with the question whether there was a sufficient substratum of fact stated or indicated in the words which were the subject of the action. Although Lord Porter said that he found his view "well expressed" in the long extract from Odgers, the later passages in his speech - which I have quoted - make it plain that his Lordship was not saying that the facts which justify the comment must be placed before the reader. Quite the contrary.

For the foregoing reasons, I am of the opinion that the statements of Sugerman J.A. in *Rigby* and *Uren* were erroneous. The tentative view of Wallace P. in *Uren* is the correct view.

Furthermore, there may be an additional answer to the argument that s. 377(8) protects a defamatory comment based on facts outside the publication. A conflict exists in the cases as to the effect of a defendant's failure to prove the basis of a comment. One view is that it will "be treated as an independent allegation of fact" *(O'Shaughnessy v. Mirror Newspapers* [1970] 72 SR (NSW) 347, per Jacobs and Mason JJ. A. at p. 361). Hunt J. (as he then was) adopted this view in *Hawke v. Tamworth Newspaper Co. Ltd.* [1983] 1 NSWLR 699, at pp. 716-717. However, there is high authority to support the opposite conclusion *(Kemsley* [1952] AC at p. 354; *Turner* [1950] 1 All ER 449). Thus, in *Kemsley,* it was said that it was not "contended that the words contained in that article are fact and not comment: rather it is alleged that they are comment with no facts to support it".

In requiring that comment be fair, s. 377(8) makes it harder for defamatory comment to obtain the protection of the sub-section than it does for defamatory statements of fact. Without the concluding words of s. 377(8), defamatory comment would have the same protection as defamatory statements of fact. But one of the purposes of the few changes to the statute of 1889 made by the Criminal Code (described by Sir Samuel Griffith as "verbal alterations" (In a letter of 29 October 1897 to the Attorney-General of Queensland, Sir Samuel Griffith wrote that he had "adopted the Defamation Law of 1889 in its entirety, with a few verbal alterations ... [the alteration to s. 377(8)] removes a possible doubt as to the construction of the existing statute": see **Carter's Criminal Law of Queensland,** 7th Edn., (1988), p. 5097) was to ensure that defamatory comment is not protected by qualified protection unless, *inter alia,* it is fair. It is not enough that the comment was published in the course of or for the purposes of a relevant discussion.

If s. 377(8) applies to comment based on facts outside the article and the correct doctrine is that the failure to prove the basis of a comment results in the comment being treated as an allegation of fact, a defendant will be able to evade the necessity to prove that the comment was fair by failing to identify the basis for the comment. Of course, a defendant always prefers - for the purpose of s. 377(8) - to contend that the defamatory matter is all fact and that none of it is comment. That contention avoids the necessity to identify the "factual basis of the comment and the risk that the Court will hold that, having regard to that "factual" basis, the comment was not fair. If the comment must be based on the defamatory facts in the publication, the Court can determine what is fact and what is comment and whether, having regard to those facts, the comment is fair. But if the defendant can rely on facts outside the article, the Court could not determine if the comment was fair if the defendant fails to identify the facts which make the comment fair. By failing to identify the basis of the comment, the defendant will then be in a position where the comment is treated as an allegation of fact. The tribunal of fact will then be forced to treat the "comment" as fact, and the

purpose of Sir Samuel Griffith's "verbal alterations" will be defeated. If the sub-section is confined to comments based on facts in the article, however, the basis of the comment is readily seen and evaluated by the tribunal of fact.

For the foregoing reasons, s. 377(8) has no application where the defamatory comment is based on facts outside the publication. That class of case does not fall within the scope and purpose of the sub-section.

4. The comment may be based on a combination of defamatory or non-defamatory facts in the publication and facts outside the publication.

Consistently with what is written above, s. 377(8) must be confined to defamatory comment based on defamatory facts published with that comment. If the defamatory facts in the publication do not justify the defamatory comment, so much of the defence under s. 377(8) as is concerned with comment will fail. In that case, the defendant must rely on the ordinary defence of fair comment under s. 375 and prove either the truth of the facts which were the basis of the comment or that they were otherwise privileged or protected.

Application of s. 377(8) in the present case

It follows from what I have said that I would hold that the defence fails in this case because the whole of the defamatory matter consisted of comment. None of the facts which formed the basis of the comment were contained in the publication. Section 377(8), therefore, was not available as a defence to the comment. Having regard to the way in which the case was conducted, it is for the Court to say what was comment and what was fact. However, my view is that, for the purpose of s. 377(8), it is always for the Court and not the jury to say what part of the defamatory matter is comment and whether it is fair. The defence of qualified protection is the statutory equivalent of the common law defence of qualified privilege *(cf. Dun v. Macintosh* [1906] 3 CLR 1134, per Griffith CJ at p. 1147). It was for the judge and not the jury to determine the question of qualified privilege although any conflicts in the evidence were resolved by the jury. "[W]hen the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion". *(Hebditch v. MacIlwaine* [1894] 2 QB 54, at p. 58). Similarly, under the Code when the facts are found it is for the judge to say whether the defamatory matter was published on an occasion of qualified protection *(cf. Telegraph Newspaper Co. Ltd. v. Bedford* [1934] 50 CLR 632).

The issue of fair comment under s. 377(8), therefore, must be a matter for the judge. Significantly, s. 379 directs that the issues of relevancy and whether the public discussion of any subject is for the public benefit are questions of fact. Significantly, the last paragraph of s. 375 states that whether a comment is fair is a question of fact. These two sections inferentially confirm that the question of fair comment under s. 377(8) is a question for the judge and not for the jury. If the judge is to determine the issue of fair comment under s. 377(8), it would seem to follow that it is for the judge to say what part of the defamatory matter is comment and what is fact for the purpose of the sub-section. Whether or not a statement is one of fact or comment frequently depends on what facts are alleged to be the basis of the comment. The judge's role might often be difficult and could be frustrated if the jury could determine what was fact and what was comment under s. 377(8). The majority judgment cites a number of cases to support the conclusion that in the case of a dispute it is for the jury to determine what is comment and what is fact *(Bamberger v. Mirror Newspapers Ltd.* [1969] 43 ALJR 242; *O'Shaughnessy v. Mirror Newspapers Ltd.* [1970] 125 CLR 166). However, those cases were dealing with common law or statutory defences of fair comment where the issue of fair comment and the issue of justification are for the jury and not for the judge. When defences under s. 375 and 378(8) are raised, the potential for conflict between the findings of the judge and the findings of the jury is likely to be present. But unless the issue of fairness under s. 377(8) is taken away from the judge and conferred on the jury - a course which I think is unjustified - some conflict is inevitable.

The subject-matter of the comment

However, even if I had favoured the view that the sub-section applied to defamatory comment when the facts which were the basis of the comment are not contained in the publication, I would have allowed the appeal. Before a defendant can rely on a defence of fair comment in a case where the facts are not set out in the article, the comment must identify, expressly or by

implication, the subject-matter of the comment *(Uren* [1969] 71 SR (NSW) at p. 42). In *Kemsley*, for example, the only reference to the plaintiff was in the heading, "Lower than Kemsley". If no more had appeared, the defence of fair comment would have been inapplicable. However, the body of the article contained a violent criticism of the papers of Lord Beaverbrook. It was held that the subject-matter of the comment "Lower than Kemsley" was sufficiently indicated. Lord Porter said *(Kemsley* [1952] AC at p. 357):

> In an article which is concerned with what has been described as 'the Beaverbrook Press' and which is violently critical of Lord Beaverbrook's newspapers, it is, I think, a reasonable construction of the words 'Lower than Kemsley' that the allegation which is made is that the conduct of the Kemsley Press was similar to but not quite so bad as that of the press controlled by Lord Beaverbrook, that is, it is possibly dishonest, but in any case low. The exact meaning ... is ... for the jury. All I desire to say is that there is subject-matter and it is at least arguable that the words directly complained of imply as fact that Lord Kemsley is in control of a number of known newspapers and that the conduct of those newspapers is in question.

In the present case, the words are clearly commenting on some subject-matter. But I do not think they indicate sufficiently or at all that the subject-matter of the comment consists of the allegations made in Parliament rather than the actual conduct of the persons in question. No case that I am aware of has gone to the extreme of saying that a defendant can use extrinsic evidence to show what was the subject-matter of the comment. It would seem contrary to principle to allow that to be done because the reader must be in a position to know what the subject-matter of the comment was even if he or she is unable to obtain information to assess the fairness of the comment. As I have pointed out, cases of fair comment made on facts not contained in the publication are an exception to the rule that the reader must be in a position to assess whether the comment is justified. But it is one thing to conclude that the defence should be available where the publication, expressly or impliedly, points to the subject-matter of the comment. It is quite a different matter to hold that the defence is available even where the publication does not identify the subject-matter of the comment, expressly or by implication.

Moreover, even if the Court is permitted to look at the publications of 7 and 9 August 1986, I do not think that it could conclude that the parliamentary allegations, rather than the actual conduct of the councillors, is sufficiently indicated as the basis of the comments. In *Jones v. Skelton* [1963] 63 SR (NSW) 644, at p. 651, the Privy Council said of a statement concerning a councillor which was followed by a question mark:

> The question mark might convey to the reasonable reader the thought and the meaning that there had been some impropriety. The reader, a jury might conclude, was invited to adopt a suspicious approach and so to be guided to the real explanation of what had taken place - an explanation which the writer of the letter did not care or did not dare to express in direct terms.

Similarly in the present case, I think that an ordinary reader would think that the question marks at the end of the first and second sentences in the advertisement indicated that there was something suspicious about the conduct of the Councillors which needed investigation.

No doubt the report of the allegations made in Parliament gave rise to the publication of the notice. But it does not follow that the notice is commenting on the allegations rather than making a statement about the actual conduct of the councillors. If the author of the notice had stated that the allegations needed investigation, any imputation concerning the plaintiff would have been the result of a comment made on the allegations. Since the allegations were made in Parliament, the defendant could comment on them without the necessity of proving the truth of the allegations (*cf. Wason* [1868] LR 4 QB 73). But the author has gone beyond that. He raises the question whether the conduct of the councillors should be investigated. The report of the parliamentary allegations forms the background and perhaps the occasion for the notice. Some of the language of the notice reflects the criticism of Mr. Menzel. But I do not think that the notice itself identifies the allegations as the subject-matter of the comment. It seeks to move the debate on to a different plane by calling for a public meeting to discuss the question whether the councillors have feathered their own nests or misappropriated funds. Consequently, it is a statement about the conduct of the councillors, not about the parliamentary allegations. The third sentence of

the publication is perfectly consistent with an indication that it is the conduct of the councillors which needs investigating. If that is so, then to establish the defence of fair comment the defendant would have to identify the facts concerning the conduct of the plaintiff in relation to his own affairs or funds of the Council which justified the suspicions implicit in the questions. No attempt was made to identify, let alone prove, such facts.

Furthermore, the trial does not appear to have been conducted on the basis that the defendant was commenting on the report of the allegations made in Parliament. The subject of public interest which was identified for the purpose of s. 377(8) was "the expenditure of the Cyclone Winifred Disaster Relief Fund and the use of Shire Council assets, labour and funds for private purposes". Thus, the defendant's own pleading confirms that the subject of public interest which was the basis of the comment was the conduct of the plaintiff and others in relation to Council assets and their use for the benefit of the plaintiff.

Order

The appeal should be allowed, and the verdict of the jury should be restored.

JOHANN MANFRED WEISSENSTEINER

v.

THE QUEEN

HIGH COURT, AUSTRALIA
MASON CJ, BRENNAN, DEANE, DAWSON, TOOHEY, GAUDRON & McHUGH JJ.
[F.C. 93/051]
17 NOVEMBER 1993

CRIMINAL LAW: Charge of murder and of theft of a sea-going vessel - Right of accused to remain silent during trial - Comment by judge on the accused remaining silent and the accused's refusal to explain facts perceived to be within his knowledge - Directions on inference of guilt - Whether trial judge had erred in his directions to the jury.

APPEAL: The jurisdiction of a judge in Queensland to comment on the failure of an accused to give evidence - Whether the judge's directions to the jury compromised the accused's position and caused a miscarriage of justice.

The appellant appeals against his conviction on a charge of murder of one Hartwig Bayerl (Bayerl) and Susan Zack (Zack) and of the theft of Bayerl's boat, the "Immanuel". The appellant had chosen not to testify at his trial. The trial had been held in Queensland, Australia. In Queensland, a trial judge is not barred from commenting on the failure of an accused to give evidence. When directing the jury, the trial judge had reminded them that the accused bore no onus to prove anything, was not obliged to testify or call evidence and that no inference of guilt could be drawn from the accused's failure to do so. However, his Honour proceeded to point out that there was no evidence from the accused "to add to, to explain, or to vary, or contradict the evidence" put before the jury by the prosecution. His Honour also said, [The prosecution] "seeks to have you infer guilt from such facts as it is able to prove to your satisfaction. Such an inference may be more safely drawn from the proven facts when the accused elects not to give evidence of relevant facts which can be easily perceived to be in his knowledge."

The appellant argued that the learned judge's directions to the jury had been against his right to silence and went further to say that the authorities which allow for judicial comment to be made as to the accused's failure to supply the